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United States District Court
Southern District of New York

KENITH A'GARD,

Plaintiff,

- against -

ADA PEREZ, ET AL.,

Defendants.

11 Civ. 1933 (JGK) (FM)

MEMORANDUM OPINION AND
ORDER

JOHN G. KOELTL, District Judge:

The plaintiff has filed the attached Request for Delay of Summary Judgment, seeking to delay the time for the plaintiff to file a response to the defendants' pending motion to dismiss this case pursuant to Rule 12 or Rule 56 of the Federal Rules of Civil Procedure. The defendants have yet to file an answer in this case, and the Magistrate Judge has stayed the defendants' obligation to respond to the plaintiff's various discovery requests until after the disposition of this dispositive pre-answer motion.

In his request, the plaintiff asserts that the facts in this case will not be available to him until the plaintiffs have responded to his (currently stayed) discovery requests.

"A party resisting summary judgment on the ground that it needs discovery in order to defeat the motion must submit an affidavit showing (1) what facts are sought to resist the motion and how they are to be obtained, (2) how those facts are

reasonably expected to create a genuine issue of material fact, (3) what effort affiant has made to obtain them, and (4) why the affiant was unsuccessful in those efforts." Miller v. Wolpoff & Abramson, L.L.P., 321 F.3d 292, 303 (2d Cir. 2003) (internal quotation marks and alterations omitted). When a party has made such a showing, a district court then may: "(1) defer considering the motion or deny it; (2) allow time to obtain affidavits or declarations or to take discovery; or (3) issue any other appropriate order." Fed. R. Civ. P. 56(d).

The plaintiff's current Request does not explain with specificity what facts the plaintiff is seeking in discovery and how those facts will create a genuine issue of material fact. The plaintiff's current request also does not address the fact that the defendants' motion is also brought pursuant to Rule 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure, under which the dismissal of a complaint may be proper before any discovery is taken based solely on the pleadings.

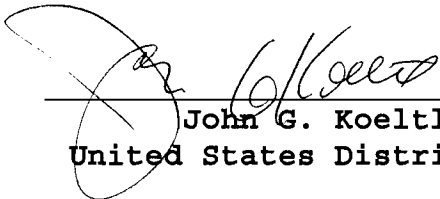
The plaintiff's Request is **denied without prejudice** to renewal as part of his response to the defendants' motion. In his response to the defendants' motion to dismiss, the plaintiff should fully address the merits of the arguments made by the defendants, including those arguments made under Rule 12 of the Federal Rules of Civil Procedure. To the extent that the plaintiff believes that there are additional documents or

discoverable materials in existence that the plaintiff does not have in his possession and that would create a genuine disputed issue of material fact in this case, the plaintiff may also make this argument in his response to the defendants' motion. The plaintiff is reminded that, to the extent that he wishes to make such an argument, he should also submit an affidavit as described above. Moreover, the plaintiff should present all of his arguments and not rely simply on a claim that he needs discovery to respond to the motion.

The plaintiff's time to respond to the defendants' motion to dismiss is extended until **April 2, 2012**.

SO ORDERED.

**Dated: New York, New York
March 1, 2012**



John G. Koeltl
United States District Judge